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No. , Original

In the Supreme Court of the United States

October Term, 1952

STATE OF ARIZONA, COMPLAINANT

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, CITY OF SAN BERNARDINO, CITY OF PASADENA, SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT, SAN BERNARDINO VALLEY MUNICIPAL WATER DISTRICT, ORANGE COUNTY WATER DISTRICT, CITY OF SANTA ANA, CITY OF SAN JUAN CAPISTRANO, CITY OF RIVERSIDE, RIVERSIDE WATER COMPANY, RIVERSIDE FLOOD CONTROL AND WATER CONSERVATION DISTRICT, RIVERSIDE COUNTY FLOOD CONTROL AND WATER CONSERVATION DISTRICT, CITY OF COLTON, SAN BERNARDINO COUNTY FLOOD CONTROL DISTRICT, SAN BERNARDINO COUNTY, SAN BERNARDINO COUNTY WATER CONSERVATION DISTRICT, SAN BERNARDINO COUNTY WATER CONSERVATION DISTRICT, ZONE D, CITY OF CHINO, CHINO BASIN MUNICIPAL WATER DISTRICT, CITY OF ONTARIO, CITY OF UPLAND, SAN ANTONIO WATER COMPANY, SAN ANTONIO WATER COURSE, SAN ANTONIO IRRIGATION DISTRICT, SAN ANTONIO CANYON MUTUAL WATER COMPANY, CITY OF POMONA, CITY OF CLAREMONT, LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, LOS ANGELES COUNTY, LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, ZONE 5, CITY OF GLENDALE, CITY OF BURBANK, CITY OF SAN FERNANDO

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MOTION ON BEHALF OF THE UNITED STATES OF AMERICA FOR LEAVE TO INTERVENE

The Attorney General and Solicitor General, on behalf of the United States of America, respectfully move this Court for leave to intervene in the above-entitled cause, and for leave to file a petition for intervention for the following reasons:

I

The State of Arizona, as complainant, seeks to invoke the original jurisdiction of this Court pursuant to the provisions of Article III, Sec-

tion 2, Clause 2, of the Constitution of the United States of America in regard to the rights and interests which it asserts in the Colorado River, a navigable, interstate stream. By a letter dated October 8, 1952, Mr. Robert L. Stern, Acting Solicitor General, advised this Court that in the event the request of the State of Arizona for permission to file its complaint was granted, the United States would move to intervene in the cause. Premised upon that action by the United States, the State of California and the other defendants named in Arizona's complaint advised this Court on December 8, 1952, of their desire to have the case proceed to effective judgment on the merits and that they would not interpose an objection to Arizona's motion for leave to file its Bill of Complaint.

II

For many years there has been a most serious conflict between the State of Arizona and the State of California regarding their respective rights to the use of the water of the Colorado River. On three different occasions the State of Arizona has unsuccessfully sought relief from this Court in connection with that long-standing controversy.[1] The pending motion is Arizona's

[1] *Arizona* v. *California*, 283 U. S. 423 (1931); *Arizona* v. *California*, 292 U. S. 341 (1934); *Arizona* v. *California*, 298 U. S. 558 (1936).

fourth attempt to obtain an adjudication in this conflict. By it Arizona seeks to have the rights which it claims in the Colorado River quieted as against the named defendants; to have construed the Colorado River Compact, the Boulder Canyon Project Act,[2] related laws, contracts and documents. In addition it seeks injunctive and ancillary relief.

III

Important in regard to the dispute between the several claimants to rights in the Lower Basin of the Colorado River are the physical phenomena of that stream and the region traversed by it. Rising in the State of Colorado near the crest of the Continental Divide at an elevation of approximately nine thousand feet above sea level, it flows for a distance of 1293 miles, draining portions of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. More than half of the average annual yield of that stream is derived from the precipitation in the form of snow and rain which fall upon the high mountains in Colorado and Wyoming. The stream in question flows through the Western half of Colorado, the State of its origin, and then through the State of Utah where it has its confluence with the Green River which rises in Wyoming. After crossing the common boundary of Utah and Ari-

[2] 43 U. S. C. 617 et seq.

zona it proceeds in a south and westerly direction to a point where it forms the boundary between the State last mentioned and Nevada. For a distance of 145 miles it separates the two States. Thereafter for 235 miles it constitutes the boundary between Arizona and California; for 16 miles it is the boundary between the State of Arizona and the Republic of Mexico. For a distance of 75 miles it flows across Mexico terminating in the Gulf of California. For 688 miles, more than half its length, the Colorado River flows in or upon the boundary of the State of Arizona. Historically commerce was carried on in the navigable lower reaches of the stream.

IV.

In its course the Colorado River traverses a semiarid area of approximately 240,000 square miles in which agriculture can be successfully practiced only through artificial irrigation. However, marked geographical and climatological differences exist between the upper reaches of the river and the lower. The former is an area of high elevations resulting in shorter growing seasons, lower demands for water and by reason of the conformation of the area, has a relatively high return flow. In the lower reaches of the stream large areas susceptible of irrigation are found. Due to the extreme aridity of climate and the long growing season the demand for water for each acre irrigated is high. Works of great mag-

nitude with commensurate costs are required to irrigate those lands.

Nearly 1,000 miles of canyon separate the lands upon which water may be beneficially applied in the upper States of the Colorado River Basin and those upon which water may be beneficially used in the Lower Basin.

V

Shortly after the turn of the present century the claims to rights to the use of water in the natural flow of the Lower Basin of the Colorado River exceeded the available supply during the latter summer months, with the attendant loss of crops due to the shortage of irrigation water. By way of contrast, early spring floods intermittently caused severe damage. Conservation of the run-off of the stream in the Lower Basin in high water periods, through regulatory dams and impounding reservoirs, was essential. That development in the lower reaches of the river was impeded, however, by the need for an apportionment of the available supply of water between the two reaches of the river alluded to in the preceding paragraph. Understandably the States of the Upper Basin viewed with concern the possible loss of their rights to the Lower Basin should that development take place without some assurance that their future needs in the river would be protected.

VI

To accomplish the required allotment and to insure the Upper Basin States that their rights would not be impaired by the development in the Lower Basin, the Colorado River Compact was formulated and signed November 24, 1922, by the several States of the Basin—Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming. By specific act of Congress[3] and Presidential Proclamation,[4] the Colorado River Compact became effective June 25, 1929, though Arizona at that time failed to ratify it. One of the conditions to the requisite Congressional approval of the Compact was that "the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters appor-

[3] Boulder Canyon Project Act, 43 U. S. C. 617 et seq.
[4] 46 Stat. 3000.

tioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."[5] California complied with that condition.[6] It was not until February 24, 1944, that the State of Arizona ratified the Compact.

VII

By the Colorado River Compact there was apportioned in perpetuity from the Colorado River System to the Upper Basin and to the Lower Basin respectively, the exclusive beneficial consumptive use annually of 7,500,000 acre-feet of water. In addition there was given to the Lower Basin the right to increase annually its beneficial consumptive use of water by 1,000,000 acre-feet.[7] The point of division between the Upper

[5] 43 U. S. C. 617c.

[6] Statutes and Amendments to the Codes of California, 1929 Extra Session, c. 16 "An act to limit the use by California of the waters of the Colorado River in compliance with the act of Congress known as the 'Boulder canyon project act' * * *."

[7] Colorado River Compact, Article III (a), (b).

"Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River above Lee Ferry.

"Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from

and the Lower Basin is Lee Ferry, 23 miles below the common boundary of the State of Arizona and the State of Utah.[8] Provision is likewise made in the Compact that under prescribed conditions water unapportioned by the Compact will be allocated at any time subsequent to October, 1963.[9]

VIII

Though repeated efforts have been made amicably to apportion among the States of the Lower Basin the waters allocated to them by the Colorado River Compact, those efforts have failed. Thus as evidenced by the Bill of Complaint of the State of Arizona, there remains undecided the question of the share of the water each State is to receive under the Colorado River Compact and the Boulder Canyon Project Act. Further, as evidenced by the Bill of Complaint of the State of Arizona the construction to be placed upon certain provisions of the Compact is a matter of grave import having far-reaching effect upon the respective rights of the parties to the controversy. Until those disputed issues are resolved, neither the United States of America nor

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which waters naturally drain into the Colorado River System below Lee Ferry.

"Lee Ferry" as noted in the text means a point on the main stream of the Colorado River a short distance below the common boundary of the States of Utah and Arizona.

[8] Colorado River Compact, Article II (f), (g).

[9] Colorado River Compact, Article III (a), (b), (c), (f).

the State of Arizona nor the parties named in Arizona's Bill of Complaint may safely proceed with further construction of diversion works from the main channel of the Colorado River involving consumptive use (domestic, agricultural, industrial, municipal) of water in the Lower Basin of the Colorado River. How those issues are resolved will greatly affect the existing and future economy of the respective States of Arizona and California.

IX

On October 11, 1948, the States of Arizona, Colorado, New Mexico, Utah and Wyoming apportioned percentage-wise among themselves the 7,500,000 acre-feet allotted to the Upper Basin under the Colorado River Compact. Relying upon the quantity of water accorded to them by the Colorado River Compact and their more recent covenant, the Upper Basin States have, in cooperation with the United States, proceeded to construct, are now constructing, and plan to construct huge projects for the conservation and utilization of that water.

X

Pursuant to the Boulder Canyon Project Act, alluded to above, and to the Reclamation Act of 1902,[10] and acts supplementary to them, the Secre-

[10] Act of June 17, 1902, Ch. 1093, 32 Stat. 388, 43 U. S. C. 391.

tary of the Interior undertook the construction of gigantic projects involving the expenditure of virtually one-half billion dollars. These are the objectives which have been expressed by Congress in connection with the development of the Colorado River in the Lower Basin—the controlling of the floods, improving navigation, regulating the flow of the Colorado River, providing for storage, for the delivery of the stored waters for reclamation of public lands, and other beneficial uses."[11] Included in that development of the Lower Basin of the Colorado River are the following components:

a. Hoover Dam, at Black Canyon, 325 miles above the Mexican boundary. This is the principal structure of the Lower Basin impounding the waters which comprise Lake Mead.

b. Davis Dam, which is located 67 miles below Hoover Dam. This structure implements the regulation of the river by Hoover Dam, impounds water for the generation of electricity and is in furtherance of the objectives of the Boulder Canyon Project Act. By express provision of the Mexican Water Treaty alluded to subsequently, the United States of America was required to construct Davis Dam to make possible the river regulation provided for in the Treaty.

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[11] 43 U.S.C. 617.

c. Parker Dam, situated 155 miles below Hoover Dam, creates Havasu Lake and is the diversion point of the Colorado River Aqueduct of the Metropolitan Water District of Southern California, which District cooperated in financing the building of the structure; waters impounded by it are utilized to generate electricity and it is operated in conjunction with Davis Dam under the Mexican Water Treaty.

d. Imperial Dam, 303 miles below Hoover Dam. It is the headworks for the All-American Canal, a Bureau of Reclamation Project in the State of California, the largest irrigation diversion system constructed in the Lower Basin development. It is likewise a diversion structure for the Gila Canal in the State of Arizona and for the Yuma Reclamation Project in the States of Arizona and California.

e. Laguna Dam, situated approximately 308 miles below Hoover Dam, a structure of the Yuma Reclamation Project mentioned above.

In addition to the principal structures mentioned, there has been constructed and is now operated a system of generators, diversion works, ditches and laterals all built and maintained to accomplish the purposes for which the Congress of the United States adopted the Reclamation Act of 1902, the Boulder Canyon Project Act, and acts amending and supplementing those acts.

XI

In accordance with the direction and authorization contained in the Boulder Canyon Project Act the Secretary of the Interior has entered into contracts for the delivery of water stored by Hoover Dam. Exercising that authority the Secretary on behalf of the United States entered into a contract dated February 9, 1944, with the State of Arizona, for the delivery annually of 2,800,000 acre-feet of water. Earlier contracts for the delivery annually of 5,362,000 acre-feet of water were entered into by the Secretary with the defendants named in the Bill of Complaint, Metropolitan Water District of Southern California, the Imperial Irrigation District, Palo Verde Irrigation District, and the Coachella Valley County Water District. Though a contract was originally entered into with the defendant City of San Diego by the Secretary of the Interior, subsequent arrangements with the Metropolitan Water District of Southern California by the City of San Diego caused the original contract to be superseded. Though the defendant City of Los Angeles does not have a contract with the Secretary of the Interior, it is a prime beneficiary of the above-mentioned contract of the defendant Metropolitan Water District of Southern California. In addition, premised upon the same authority, the Secretary of the Interior has contracted to deliver to the State of Nevada 300,000

acre-feet. Thus the contracts which the Secretary of the Interior has entered into in the Lower Basin for the delivery of stored water total 8,462,000 acre-feet annually. Contained in substance in each of the contracts is a provision that the United States shall, from storage available in the reservoir created by Hoover Dam, deliver water at a point on the Colorado River in accordance with the Colorado River Compact and the Boulder Canyon Project Act.

XII

In addition to the foregoing rights, interests and obligations of the United States of America in the Lower Basin of the Colorado River arising in connection with the Colorado River Compact and the Boulder Canyon Project Act, it has many others. Reference in that regard is made to the Colorado River Compact which provides that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[12] Thus there is excluded from the operation of the compact the rights of the United States to divert or to have diverted water from the Colorado River and its tributaries on behalf of the Indians. There is annually diverted for or by the Indians from the Colorado River and its tributaries in the Lower Basin in excess of 750,000 acre-feet and there are

[12] Colorado River Compact, Article VII.

asserted, in the ultimate, claims to a greater amount.

A principal structure across the main channel of the stream in question is the Headgate Rock Dam situated 14 miles below Parker Dam. That structure diverts water for use in the Colorado River Indian Reservation in the State of Arizona. Other large irrigation projects have been constructed for the benefit of the Indians on the tributaries of that stream.

XIII

In addition to the rights, interests, and obligations of the United States alluded to above, it has international responsibilities to Mexico pursuant to a treaty whereby there was "guaranteed" to Mexico an annual quantity of 1,500,000 acre-feet of Colorado River water.[13]

XIV

In addition to other responsibilities on the stream, flood control on the Colorado River is an important function of the United States. Not only is it required to operate Lake Mead in a manner which will afford flood control benefits but it is now building on the Bill Williams River and the Gila River large structures which will be operated primarily for that purpose.

[13] Treaty, Executive A, 78th Congress, 2d sess.; Protocol, Executive A, 78th Cong., 2d sess. Pursuant to the Mexican Treaty Davis Dam was constructed by the United States.

XV.

Large Fish and Wild Life projects are owned and operated by the United States on the Colorado River. Similarly, there are in the Lower Basin numerous recreational areas under the jurisdiction of the National Park Service. Administered by the Bureau of Land Management are large areas of public domain susceptible of cultivation only if artificially irrigated. All of those Federal functions in the Lower Basin of the Colorado River are dependent upon that source or its tributaries for water.

XVI

The aggregate of the various claims to rights to the use of water in the Lower Basin of the Colorado River far exceeds the eight million five hundred thousand acre-feet of water available to that Basin under the Colorado River Compact. Moreover, the State of Arizona asserts claims adverse to the rights to the use of water claimed and exercised by the named defendants and brings into question the rights and interests claimed and exercised by the United States in the Lower Basin. In addition, the adverse claimants seek different interpretations of the several provisions of the Colorado River Compact, the Boulder Canyon Project Act, related laws and documents.

Premised upon the adverse claims of the parties litigant to the waters allocated to the Lower

Basin of the Colorado River, it is necessary and appropriate that the United States have declared its rights and interests in the Lower Basin of the Colorado River, and have them quieted as against those adverse claims. It is also necessary and appropriate that the United States have defined its obligations and responsibilities in the Lower Basin of the Colorado River and have such other and further relief as this Court may deem proper.

Wherefore, the United States of America respectfully prays this Court to permit it to file a petition for intervention in this case subsequent to the time that the defendants have filed their answers to the Bill of Complaint of Arizona.[14]

JAMES P. MCGRANERY,
Attorney General.

WALTER J. CUMMINGS, JR.,
Solicitor General.

DECEMBER , 1952.

[14] The United States is unable to formulate a proper and detailed petition for intervention until the defendants have made their formal claims and disclosed their positions in their answers to the Bill of Complaint.

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BRIEF OF THE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO INTERVENE

PRELIMINARY STATEMENT

In the motion to intervene of the United States of America, the long-standing controversy respecting rights to the use of water in the Lower Basin of the Colorado River is reviewed. As revealed in that motion, the State of Arizona has for the fourth time sought relief from this Court in regard to that controversy.[1] Reference there

[1] Motion on Behalf of the United States of America for Leave to Intervene, par. II.

was likewise made to the previous expression of intention on the part of the United States to intervene in the proceeding if Arizona's motion is granted; and to the declaration filed with this Court by the State of California and the other named defendants, which, having first referred to the need for a judicial determination of the controversy on the merits, declared, based upon the expression of intention by the United States, that they would interpose no objection to the granting of Arizona's motion.

By a letter dated October 15, 1952, this Court through its Clerk requested the United States of America to express its views in regard to jurisdiction. In the light of the facts contained in the motion of the United States and the Bill of Complaint of the State of Arizona, those views will be expressed in this brief.

To be emphasized at the outset is the fact that there has been apportioned by the Colorado River Compact from the Colorado River System in perpetuity to the Upper Basin of that stream the exclusive beneficial consumptive use of 7,500,000 acre-feet of water. Similarly, there has been apportioned from the Colorado River System in perpetuity to the Lower Basin of that stream the exclusive beneficial consumptive use of 7,500,000 acre-feet of water. In addition to this apportionment to the Lower Basin, the Colorado River Compact gives to the Lower Basin the right to increase its beneficial consumptive use of such

water by 1,000,000 acre-feet annually.[2] By its Bill of Complaint, the State of Arizona seeks only to have this Court assume jurisdiction in regard to rights to the use of water in the Lower Basin of the stream in question.

DISCUSSION

I. THIS COURT IS INVESTED BY THE CONSTITUTION AND CONGRESSIONAL ENACTMENTS WITH ORIGINAL JURISDICTION OF CASES OF THE GENERAL CHARACTER HERE INVOLVED

This Court has original and exclusive jurisdiction of cases of the character which the State of Arizona seeks to initiate against the State of California and the other named defendants, as is clear from the constitutional provisions pursuant to which the Nation's judiciary has been established,[3] and from express congressional enact-

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[2] Colorado River Compact, Article III (a) and (b).

"Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River above Lee Ferry.

"Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry.

"Lee Ferry" means a point on the main stream of the Colorado River a short distance below the common boundary of the States of Utah and Arizona. See par. VII of the Motion on Behalf of the United States of America for Leave to Intervene.

[3] Constitution of the United States, Article III, Section 2, Cl. 2.

ment: "The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States; * * *."[4]

Repeatedly, this Court has assumed jurisdiction where, as here, a controversy respecting an interstate stream has arisen.[5] Under circumstances resembling the present controversy, the Court exercised original jurisdiction over a controversy between the States of Wyoming and Colorado concerning their respective rights to divert and use water from an interstate stream.[6] Earlier, jurisdiction was assumed by this Court regarding a dispute between the States of Colorado and Kansas.[7] By Colorado's pleading, the question was presented as to whether it was empowered wholly to deprive the State of Kansas of the benefit of water from a stream which rises in the State of Colorado and by nature flows through Kansas.[8] Jurisdiction was likewise assumed in the injunctive proceeding initiated by the State of Wisconsin and others against the State of Illinois and a public corporation of that State to prevent the withdrawal of large quantities of water from Lake Michigan.[9] Original jurisdiction by this Court has been assumed in cases between States involving the pol-

[4] 28 U. S. C. 1251.

[5] See *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 26–7 (1950).

[6] *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

[7] *Kansas* v. *Colorado*, 185 U. S. 125 (1902).

[8] See also *Kansas* v. *Colorado*, 206 U. S. 46 (1907).

[9] *Wisconsin* v. *Illinois*, 278 U. S. 367 (1929).

lution of an interstate stream.[10] More recently, this Court entertained the bill of complaint in an original proceeding by the State of Nebraska against the State of Wyoming to have determined the rights of the two States in the waters of the North Platte River.[11]

Moreover, Arizona's Bill of Complaint presents issues concerning the interpretation of the Colorado River Compact, an interstate agreement. Such questions of compact construction are federal in nature, and if the suit is otherwise within this Court's jurisdiction, are properly to be determined by this Court.[12] Since this is a suit by one State against another State—and thus within the Court's original jurisdiction—the issues of interpretation of the Compact are properly before it.[13]

From these authorities it is manifest that this Court has accorded judicial cognizance to controversies between States involving issues of the character presented by Arizona in its Bill of Complaint. In addition, however, to those deci-

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[10] *Missouri* v. *Illinois*, 180 U. S. 208 (1900).

[11] *Nebraska* v. *Wyoming*, 295 U. S. 40 (1935), 325 U. S. 589 (1944); see also *Texas* v. *New Mexico*, 343 U. S. 932, order entered December 23, 1952, No. 9 Orig. (1952).

[12] *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22 (1950); *Kentucky* v. *Indiana*, 281 U. S. 163 (1930); *Hinderlider* v. *La Plata Co.*, 304 U. S. 92 (1937).

[13] See *Kentucky* v. *Indiana*, 281 U. S. 163 (1930). In Part IV, *infra*, we discuss the reasons for taking jurisdiction of the present controversy.

sions, are those regarding the controversy which the State of Arizona seeks permission to bring before this Court for settlement. Those decisions are considered in some detail in the section which follows.

II. REVIEW OF EARLIER DECISIONS OF THIS COURT RESPECTING THE CONTROVERSY BETWEEN THE STATES OF ARIZONA AND CALIFORNIA

The earlier decisions respecting Arizona's efforts to have this Court resolve the long-standing controversy to which Arizona's Bill of Complaint relates and which California has expressed its desire to have determined on its merits, and the factors giving rise to them, will be reviewed in the order in which they were rendered by this Court.

On October 13, 1930, Arizona filed an original Bill of Complaint against the then Acting Secretary of the Interior, Ray Lyman Wilbur, and the other Colorado River Basin States of California, Nevada, Utah, New Mexico, Colorado and Wyoming.[14] Among other things, the Bill challenged the constitutionality of the Boulder Canyon Project Act.[15] Arizona likewise prayed that the Secretary of Interior and the other named defendants be permanently enjoined from carrying out the provisions of the last-mentioned Act. All of the defendants moved to dismiss Arizona's

[14] *Arizona* v. *California*, 283 U. S. 423 (1931).

[15] Act of December 21, 1928 (45 Stat. 1057), 43 U. S. C. 617 et seq.

Bill on the grounds that: (1) the United States, not joined in the proceeding, was an indispensable party; (2) the Bill did not present a case of which this Court would take judicial cognizance; (3) the action of the defendants would not invade vested rights of Arizona or its citizens; (4) the Bill did not state facts which constituted a claim against any of the defendants.

Mr. Justice Brandeis, speaking for the Court, took judicial notice of the navigable character of the Colorado River and declared the Boulder Canyon Project Act to be constitutional. Continuing, the opinion declared that Arizona could not successfully contend that there was an actual or threatened invasion of its rights. In that connection, Mr. Justice Brandeis observed: "When the Bill was filed, the construction of the dam [Hoover Dam] and reservoir had not been commenced. Years must elapse before the project is completed."[16] In the light of those facts, Arizona's Bill was "dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same."[17]

Since that dismissal, immense changes have transpired in the Lower Basin of the Colorado

[16] *Arizona* v. *California*, 283 U. S. 423, 463 (1931).

[17] *Arizona* v. *California*, 283 U. S. 423, 464 (1931).

River. Reflecting that fact are the allegations contained in the motion of which this brief is in support.[18] There, in some detail, are reviewed the structures which have, with minor exceptions, been constructed since that dismissal. A stream which in a state of nature fluctuated with great violence is now a stream subject to virtually complete regulation. Hoover Dam and the other structures on the main channel have effectuated that control with the attendant drastic change in the regimen of the stream.

Following the dismissal of the action reviewed above, Arizona, on February 14, 1934, moved for leave to file in this Court an original Bill to perpetuate testimony in actions arising out of the Boulder Canyon Project Act it would commence in the future against the State of California.[19] In its opinion, the Court observed that while no Bill to perpetuate testimony had been previously filed with it, there is no reason why it did not have jurisdiction to entertain such a bill "in aid of litigation pending * * *, or to be begun here."[20] The Bill, however, was dismissed for there was no showing that the testimony involved was competent or material evidence.

At the time that the opinion just discussed was entered, sharp conflict arose over the proposed

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[18] Motion on Behalf of the United States of America for Leave to Intervene, par. X.

[19] *Arizona* v. *California*, 292 U. S. 341 (1934).

[20] *Arizona* v. *California*, 292 U. S. 341, 347, 360 (1934).

construction of Parker Dam,[21] now an integral part of the development of the Lower Basin of the Colorado River. That conflict culminated in the United States having recourse to this Court to enjoin Arizona's interference with the completion of the structure in question.[22] The complaint, however, was dismissed by reason of its failure to declare authority for the construction of the dam. Congress subsequently granted the required authority.

Continuing its effort to have reviewed its claim to Colorado River water, Arizona, on November 25, 1935, moved this Court for leave to file a bill of complaint which in substance sought an equitable apportionment of the rights to the use of the waters of the stream in question among the States of the Colorado River Basin.[23] In dismissing Arizona's motion, this Court reviewed at length the status occupied by the United States regarding the Colorado River. Emphasized was the fact that no decree equitably apportioning the rights to the water as prayed was possible without determining the rights of the United States. Such an apportionment, declared the Court, "could not be determined without ascertaining the rights of the United States to dispose of that water * * * without challenging the disposi-

[21] Motion on Behalf of the United States of America for Leave to Intervene, par. X.

[22] *United States* v. *Arizona*, 295 U. S. 174 (1935).

[23] *Arizona* v. *California*, 298 U. S. 558 (1936).

tions already agreed to by the Secretary's contracts with the California corporations, and the provision as well of Sec. 5 of the Boulder Canyon Project Act that no person shall be entitled to the stored water except by contract with the Secretary [of the Interior]."[24] Declaring that those matters pertaining to the United States could not be determined in a proceeding to which it was not a party, the Court denied Arizona's motion since the bill of complaint "could only be dismissed because of the absence of the United States as a party."[25]

As this review shows, the State of Arizona has been repeatedly unsuccessful in securing judicial cognizance by this Court of the controversy which it asserts in its Bill of Complaint. But many elements which previously militated against that hearing are no longer present. In the succeeding section, certain of those factors are discussed.

III. PRESENT LEGAL STATUS AND DEVELOPMENTS WHICH HAVE BEARING UPON THIS COURT'S JURISDICTION

Since this Court denied Arizona's motion for leave to file a bill of complaint for the equitable apportionment of the Colorado River,[26] drastic and far-reaching changes have come about. Not the least of those changes are the willingness of

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[24] *Arizona* v. *California*, 298 U. S. 558, 571 (1936).
[25] *Arizona* v. *California*, 298 U. S. 558, 572 (1936).
[26] 298 U. S. 58.

the United States to intervene and the willingness of the State of California that the long-standing controversy be resolved on its merits.

Quite aside, however, from the revised attitude of the United States and California, other changes of significance have transpired. Arizona has ratified the Colorado River Compact and has contracted for water with the Secretary of the Interior under the terms of that Compact and the Boulder Canyon Project Act.[27]

Great impounding dams have been constructed in the main channel of the Colorado River and large diversion works have been constructed which withdraw annually from the stream millions of acre-feet of water.[28] Arizona charges that in the year 1951 there was diverted by the claimants to water in the State of California a quantity of water exceeding the 4,400,000 acre-feet and that anticipated diversion for 1952 will be greater than the quantity previously diverted. Arizona, in its Bill of Complaint, charges those diversions to be in derogation of its rights.[29] Moreover, there exist diversion works in California capable of an annual draught on the river

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[27] Motion on Behalf of the United States of America for Leave to Intervene, par. VI; par. XI.

[28] Motion on Behalf of the United States of America for Leave to Intervene, par. X.

[29] *Arizona* v. *California*, Pending Bill of Complaint, par. XXVI.

of approximately 8,000,000 acre-feet.[30] Likewise important is the fact that on what has been termed the "subject to availability clause" of the water contracts, the Secretary of the Interior has contracted to deliver annually to claimants in the Lower Basin 8,462,000 acre-feet of main stream water.[31]

Large projects have been developed and are now being developed by the United States upon the tributaries of the Colorado River in the Lower Basin. Moreover, the State of Arizona has declared that it will proceed with the construction of Granite Reef Aqueduct.[32]

Other drastic and far-reaching changes have also happened in the Lower Basin of the Colorado River since this Court's latest decision in regard to Arizona's claims. One factor is the coming into existence of the Mexican Water Treaty.[33] By that international covenant the United States of America "guaranteed" to Mexico an annual quantity of 1,500,000 acre-feet of Colorado River water. Severally, the States of the Upper Basin of the Colorado River have apportioned among themselves the 7,500,000 acre-feet

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[30] *Arizona* v. *California*, Pending Bill of Complaint, par. XXVI.

[31] Motion on Behalf of the United States of America for Leave to Intervene, par, XI.

[32] *Arizona* v. *California*, Pending Bill of Complaint, par. XXI.

[33] Motion on Behalf of the United States of America for Leave to Intervene, par. XIII.

of water annually allotted to that Basin by the Colorado River Compact.[34] Development of that Basin is going forward premised upon that apportionment.

The economies and, to a large extent, the future of the Upper and Lower Basins of the Colorado River are dependent upon the Colorado River. Predicated upon those factors reviewed above, consideration will next be directed to the controversy existing in the Lower Basin as it relates to the jurisdiction of this Court.

IV. A JUSTICIABLE CONTROVERSY EXISTS BETWEEN CLAIMANTS TO THE USE OF THE WATERS ALLOTTED TO THE LOWER BASIN BY THE COLORADO RIVER COMPACT.

In the Bill of Complaint which Arizona seeks leave to file and in the Motion of the United States to Intervene, reference is made to the allocation of the waters of the Colorado River between the Upper Basin and the Lower Basin of the Colorado River.[35] That allocation is in perpetuity establishing the measure of the rights of the two vast areas in question, which, as stated, are separated by almost a thousand miles of canyon and extremely broken terrain. Again emphasized is the fact that Arizona's Bill of Com-

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[34] Motion on Behalf of the United States of America for Leave to Intervene, par. IX.

[35] *Arizona* v. *California*, Pending Bill of Complaint, par. VI, et seq.; Motion on Behalf of the United States of America for Leave to Intervene, par. VII.

plaint relates solely to the Lower Basin. Similarly, the Motion of the United States is limited to that area.

Under the Compact and the Boulder Canyon Project Act, each Basin is proceeding to develop its respective areas in reliance upon that allocation. It is significant, however, that the Lower Basin of the Colorado River has developed far more rapidly than the Upper Basin.

The aggregate of the claims of rights to the use of water in the Lower Basin of the Colorado River greatly exceeds the firm quantities of water available to it. Otherwise stated, the 8,500,000 acre-feet accorded to the Lower Basin is insufficient to meet existing claims. Further development of consumptive uses of the Lower Basin of the Colorado River may not safely proceed until the long-standing dispute to which this suit pertains is resolved. Mr. Justice Brandeis in an earlier phase of this controversy summarized as follows the charges then made by Arizona respecting the need for a determination of rights in the Lower Basin: "The cost of installing the dams, reservoirs, canals, and distribution works required to effect any diversion, will be very heavy; and financing on a large scale is indispensable. Such financing will be impossible unless it clearly appears that, at or prior to the time of constructing such works, vested rights to the permanent use of the water will be ac-

quired."[36] That statement reveals the true character of the controversy here presented. For in the light of the present controversy, there can be no certainty in the Lower Basin respecting claims to vested rights to the permanent use of water from the Colorado River for consumptive purposes.[37]

It is recognized that this Court is reluctant to take and determine interstate water controversies unless the dispute is important, a judicial solution appears preferable, and other means of settling the controversy are, as a matter of reality, unavailable.[38] But it is likewise suggested that this case falls within the criteria for assuming jurisdiction which the Court has hitherto applied. For example, there is here presented every element which caused the Court to assume jurisdiction of another recent controversy involving an interstate stream.[39] Those factors were alluded to in the opinion in the following manner:

[1] "A genuine controversy exists." Manifestly, Arizona's pleading, the long-standing contentious struggle between the conflicting States, and the interests of the United States, resolve

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[36] *Arizona* v. *California*, 283 U. S. 423, 453 (1931).

[37] Motion on Behalf of the United States of America for Leave to Intervenue, par. VIII.

[38] See *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 27 (1950).

[39] *Nebraska* v. *Wyoming*, 325 U. S. 589, 608 (1944).

any doubt regarding the presence of the controversy.

[2] "The States have not been able to settle their differences by compact." That fact is indisputable in the present instance and it would appear futile to remit the parties to further negotiation.[40]

[3] "The areas involved are arid or semiarid. Water in dependable amounts is essential to the maintenance of the vast agricultural enterprises established on the various sections of the river." With greater emphasis that statement could have been written respecting the Lower Basin of the Colorado River.

[4] "The Kendrick Project plainly is an existing threat to senior appropriators downstream." With respect to this element of a present threat as a factor in determining the existence of a justiciable issue, reference is made to these facts: Diversion works in California are capable of diverting 8,000,000 acre-feet; Arizona has taken initial steps to construct the Granite Reef Project;[41] there has been guaranteed annually to Mexico 1,500,000 acre-feet; large claims are asserted on behalf of the Indians whose rights are excluded from the operation of the Colorado River Compact; contracts have been entered into by the

[40] Motion on Behalf of the United States of America for Leave to Intervene, par. VIII.

[41] *Arizona* v. *California*, Pending Bill of Complaint, par. XXI.

Secretary of the Interior for the delivery of 8,462,000 acre-feet annually;[42] sharp conflict exists over the interpretations to be placed upon the Colorado River Compact and the basic laws upon which the Lower Basin of the Colorado River has been and is now being developed.

Those contentious elements must be viewed against the background of an available supply of 8,500,000 acre-feet apportioned to the Lower Basin. In the light of those factors, it is respectfully submitted that there is present a far more acute situation in the Lower Basin of the Colorado River than that which prevailed in the *Nebraska v. Wyoming* case concerning which this Court took judicial cognizance.

In still another case, jurisdiction was assumed by this Court over a controversy between States involving an interstate stream where the aggregate of the claims to water from the stream was found to exceed the supply available in the stream.[43] Respecting that case, this Court commented: "* * * where there is not enough water in the river to satisfy the claims asserted against it, the situation is not basically different from that where two or more persons claim the right to the same parcel of land."[44] In the present case, numerous and varied claims are made which exceed the quantity of water available to the

[42] Motion on Behalf of the United States of America for Leave to Intervene, par. XI.

[43] *Wyoming* v. *Colorado*, 259 U. S. 419 (1922).

[44] *Nebraska* v. *Wyoming*, 325 U. S. 589, 610 (1944).

Lower Basin under the Colorado River Compact. The entire economy of the Lower Basin of that stream is directly and immediately affected by the manner in which the present conflict is resolved. Few cases of this character have presented more complex questions in greater need of determination.[45]

Finally, the bar to jurisdiction which this Court found in the earlier suit[46]—the indispensability of the United States—has been removed. The United States is willing, if permitted, to intervene in the litigation and to file a petition for intervention seeking a declaration of its rights and obligations. That bar being removed, there is full jurisdiction of Arizona's suit against California and the other defendants.[47] There is no question, of course, that the Court has original jurisdiction of a claim or suit by the United States against a State.[48]

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[45] This case fully meets the standard laid down by Mr. Justice Holmes, speaking for the Court, in *Missouri* v. *Illinois*, 200 U. S. 496, 521 (1905): "Before this Court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."

[46] 298 U. S. 558 (1936).

[47] See *Arizona* v. *California*, 298 U. S. 558, 572 (1936); *Texas* v. *New Mexico*, 343 U. S. 932; order entered December 23, 1952, No. 9, Orig. (1952).

[48] *United States* v. *California*, 332 U. S. 19 (1947); *United States* v. *Louisiana*, 338 U. S. 806 (1949), 339 U. S. 699 (1949); *United States* v. *Texas*, 338 U. S. 806 (1949), 339 U. S. 707 (1949).

CONCLUSION

Accordingly, this Court is respectfully requested to grant the motion of the United States to intervene, permitting it to file its pleadings in intervention after the defendants named in Arizona's Bill of Complaint have filed their responsive pleadings.[49]

Respectfully submitted,

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DECEMBER , 1952.

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[49] See Motion on Behalf of the United States of America for Leave to Intervene, p. 16, note 14.